FILE COPY

No. 249

Office Supreme Court, U.S.
FILED
SEP 3 1958
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

H. B. MCFARLING, JOHN G. SCOTT, AND MOUNTAIN VALLEY SALES CO., A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

WILLIAM W. GOODRICH,
Assistant General Counsel,
PAUL M. STEFFY,
Attorney,
Department of Health, Education and Welfare,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:

Ackermann v. *United States*, 340 U.S. 193	6
Buticaps, Inc. v. *United States*, 252 F. 2d 634	6
City Bank of Fort Worth v. *Hunter*, 152 U.S. 512	9
Goodwin v. *United States*, 2 F. 2d 200	8
United States v. *Arizona Canning Company*, 212 F. 2d 532	8, 9
United States v. *One Device * * * Colonic Irrigator*, 160 F. 2d 194	8
United States v. *Six Dozen Bottles * * * Kuriko*, 158 F. 2d 667	8
United States v. *62 Packages * * * Marmola*, 142 F. 2d 107, certiorari denied, 323 U.S. 731	8
United States v. *United States District Court*, 334 U.S. 258	5
United States v. *Urbeteit*, 335 U.S. 355	7
United States v. *Urbuteit*, 336 U.S. 804, reversing *Urbeteit* v. *United States*, 172 F. 2d 386	7
Urbeteit v. *United States*, 164 F. 2d 245	7
Urbeteit v. *United States*, 172 F. 2d 386	7
Urbeteit v. *United States*, 176 F. 2d 438, certiorari denied, 338 U.S. 947	8

Statute and Rule:

Federal Food, Drug, and Cosmetic Act:	
Sec. 403(j), 21 U.S.C. 343(j)	2, 3
Sec. 502(a), 21 U.S.C. 352(a)	2
Federal Rules of Civil Procedure, Rule 45(e)(1)	8

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 249

H. B. MCFARLING, JOHN G. SCOTT, AND MOUNTAIN VALLEY SALES CO., A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals in the mandamus proceeding (Pet. App. 15-18) is not yet reported. The earlier opinion of the Court of Appeals is reported at 247 F. 2d 473.

JURISDICTION

The order of the Court of Appeals was entered on May 28, 1958 (Pet. App. 19). A petition for rehearing was denied on June 27, 1958. The petition for a writ of certiorari was filed August 4, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where a district court attempted to give effect to a jury verdict which the appellate court had held to be based upon an erroneous instruction, the appellate court may correct such action by ordering stricken from the decree the provisions based upon the voided verdict.

2. Whether a district court may limit costs upon a theory inconsistent with the mandate and opinion of the reviewing court.

STATEMENT

Petitioners, intervenors in the mandamus proceedings below, seek review of an order of the Court of Appeals compelling compliance by the District Court for the Western District of Arkansas with the Court of Appeals' prior mandate issued after reversal of a judgment against the United States in a seizure action under the Federal Food, Drug, and Cosmetic Act (see 247 F. 2d 473). The petitioners here were appellees on the original appeal.

As appears from the earlier opinion of the Court of Appeals (Pet. App. 21-35), the original action was for condemnation of a quantity of bottled mineral water, alleged to have been misbranded in that (1) the "labeling" (promotional literature) falsely represented it to be an effective treatment of various diseases in violation of Section 502(a), 21 U.S.C. 352(a), and (2) that the water was represented for special dietary uses without its labeling bearing information as to its mineral properties, in violation of Section 403(j), 21 U.S.C. 343(j).

At the close of the trial before a jury at Hot Springs,

Arkansas,[1] the government filed a motion for a directed verdict on the ground that uncontroverted evidence established that the water was recommended for dietary use and that the labels failed to contain the information required by the applicable regulations as to products so recommended. The court denied the motion, and submitted the issue to the jury. The court also submitted to the jury the question of whether the promotional literature constituted labeling, and whether it was false and misleading. The jury found in favor of the petitioners.

On appeal, the Court of Appeals reversed. It held that the district court erred in not directing a verdict for the government on the Section 403 charge that the water was recommended for dietary use without proper information on the label. It also held (Pet. App. 33) that "all of the sales literature received in evidence was, as a matter of law, 'labeling' * * * and that the question whether the literature was 'labeling' was not an issue for the jury."

The mandate, filed in the District Court on August 29, 1957, ordered reversal, and the entry of a decree of condemnation (Pet. App. 36, 37).

On December 19, 1957, the District Court entered a judgment of condemnation and destruction finding the water misbranded under Section 403(j) of the Federal Food, Drug, and Cosmetic Act. However, it also ordered the government's charges concerning false and misleading labeling claims dismissed with prejudice, and, consistent with this dismissal of part of the case, limited costs to those directly attributable to proof of

[1] The case was originally filed in Memphis, Tennessee, but removed first to Little Rock and then to Hot Springs after lengthy pretrial litigation. 226 F. 2d 238.

the charge of misbranding under Section 403(j). The dismissal with prejudice and the limitation of costs were based upon the trial court's belief that the jury verdict had not been reversed as to the false and misleading labeling claims (Pet. App. 37-39).

The government petitioned for mandamus to compel the trial court to adhere to the prior opinion and mandate of the Court of Appeals. That court found that the judgment as entered did not conform to its mandate. It directed the District Court to eliminate the paragraph dismissing the misleading charge with prejudice, and to strike out the limitation of costs (Pet. App. 15-20). The Court of Appeals was of the view that "every element and issue which inhered in the verdict upon which the judgment appealed from in the libel proceeding was based, disappeared from the case when this Court reversed that judgment and directed the entry of a judgment in favor of the Government on the ground that, under the evidence and as a matter of law, it was entitled to a judgment of condemnation at the close of the evidence" (Pet. App. 17).

ARGUMENT

The petition for a writ of certiorari seeks to have this Court correct the Eighth Circuit's own interpretation of its prior opinion. That court is in the best position to say what its prior decision held, and there is no need for further review.

1. Petitioners' argument is based on the assumption that, in its original reversal, the Court of Appeals found no error which would affect the verdict in their favor on charges of false and misleading labeling claims. On this assumption, they argue (Pet. 8-12) that they have been deprived of the benefit of a trial by jury:

The record is clear, however, that the Court of Appeals found, not only that the case should never have gone to the jury in the first place, but that it was error to submit to the jury the issue of whether the promotional material was labeling (Pet. App. 33, see quotation, *supra*, p. 3).

At the trial, the claimants admitted that four pamphlets were labeling, but contended that four other pamphlets (No. 15679, R. 355, 357, 373, 385) were not. The district judge charged the jury that it was free to find that the four challenged pamphlets were not "labeling"; and, if not, they could ignore any false or misleading statements in such pamphlets in deciding whether the spring water was misbranded by false and misleading claims (No. 15679, R. 299). It is thus impossible to tell whether the verdict in petitioners' favor on the misleading statements charge was based on the erroneous theory that the four challenged pamphlets (which contained the most direct statements as to curative value) were not labeling, or on a finding that the statements were not misleading. Since the issue went to the jury on improper instructions, the verdict was not, as petitioners claim, a clear-cut ruling in their favor "which was obtained without error on such issues" (Pet. 11). It was a verdict based on an instruction found to be erroneous, therefore a verdict which could have no validity. The Court of Appeals was acting consistently with its prior opinion when it found that the district judge erred in attempting to give effect to the verdict by dismissing with prejudice the government's charges of false and misleading labeling claims (Pet. App. 37, 38). As this Court pointed out in *United States v. United States District Court*, 334 U.S. 258, 264, it is "a high function of mandamus to

keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court."

The action of the Court of Appeals is not, as petitioners assert (Pet. 9-10), in conflict with *Buticaps, Inc.* v. *United States*, 252 F. 2d 634 (C.A. D.C.). In the *Buticaps* case, after judgment on the pleadings had been granted in favor of the government, the claimant attempted to obtain an adjudication as to whether the name, "Buticaps", was itself false and misleading. The District Court, which had agreed to allow relabeling, refused to adjudicate the dispute between the government and the claimant as to what would constitute proper relabeling to correct the falsehoods, and instead ordered the article destroyed. The Court of Appeals reversed, holding that the government could proceed to a decree of relabeling on the admitted falsehoods, or seek a hearing on the issue of the truth or falsity of the name, but that claimant could not be deprived of the name without a judicial hearing.

Here, it is undisputed that the bottles at issue have properly been ordered condemned. Despite this, petitioners are seeking a judgment in their favor that their promotional material is not misleading. Since, for the reasons discussed above, there is no valid adjudication to such effect, they clearly are not entitled to the judgment to such effect which they seek in this proceeding.[2]

---

[2] After the government filed its petition for mandamus on March 11, 1958, and five days after the response to such petition was originally due, the petitioners filed a motion in the District Court on April 4, 1958, requesting relabeling. By this action, they attempted to bring themselves within the holding of the *Buticaps* case, the decision in which was rendered on January 30, 1958. No decision was ever rendered on the motion to relabel, and it has been made moot by the Court of Appeals' action in directing destruction. As this Court held in *Ackermann* v. *United States*, 340

The action of the Court of Appeals in this case is in accord with that directed by this Court and other courts of appeals. In *United States* v. *Urbuteit*, 336 U.S. 804, reversing *Urbeteit* v. *United States*, 172 F. 2d 386 (C.A. 5), the device was alleged to have been misbranded because of both false diagnostic and false curative claims. The Court of Appeals reversed a judgment of condemnation and destruction on the grounds that certain literature shipped separately from the devices was not labeling, and also because the court refused to admit in evidence certain testimony for the claimant concerning the curative effect of the device. See, *Urbeteit* v. *United States*, 164 F. 2d 245 (C.A. 5). On certiorari, this Court reversed the holding concerning labeling, but upheld the ruling concerning the admission of evidence. The case was remanded to the Court of Appeals to determine whether, despite the erroneous exclusion of evidence as to the curative properties of the machine, the evidence of misbranding as to the diagnostic capabilities was alone sufficient to sustain the decree of condemnation and destruction. *United States* v. *Urbuteit*, 335 U.S. 355. On remand, the Court of Appeals sent the case back to the District Court to take further evidence, without resolving the question as to whether the evidence was sufficient on the one misbranding charge to justify the decree. *Urbeteit* v. *United States*, 172 F. 2d 386. Again certiorari was granted, and the Court of Appeals was reversed. The Court stated, *per curiam*, in *United States* v. *Urbuteit*, 336 U.S. 804, 806:

> When the case was here before * * * we did leave to the Court of Appeals for consideration a further

U. S. 193, 198, the fact that an intervening opinion may change pre-existing concepts concerning the law is not a sufficient reason to relieve parties to a lawsuit of conscious and deliberate choices.

question—whether the evidence as respects the falsity of the representations regarding the diagnostic capabilities of the machines was adequate to sustain the condemnation even though error in exclusion of the other evidence were conceded. The United States is entitled to a hearing on that question.

On remand, the Court of Appeals affirmed the lower court's judgment, thus sustaining the condemnation decree on the one charge of misbranding proved by the undisputed evidence. *Urbetcit* v. *United States*, 176 F. 2d 438 (C.A. 5), certiorari denied, 338 U.S. 947.

The Courts of Appeals in other circuits have taken similar action. See *Goodwin* v. *United States*, 2 F. 2d 200, 201 (C.A. 6); *United States* v. *62 Packages* * * * *Marmola*, 142 F. 2d 107, 111 (C.A. 7), certiorari denied, 323 U.S. 731; *United States* v. *Six Dozen Bottles* * * * *Kuriko*, 158 F. 2d 667, 669-670 (C.A. 7); and *United States* v. *One Device* * * * *Colonic Irrigator*, 160 F. 2d 194, 200 (C.A. 10).

2. The District Court's ruling limiting costs to those attributable to the Section 403(j) charge was based on its theory that there was a valid finding in petitioners' favor on the misleading claims charge. Since this premise was found to be untenable, the Court of Appeals properly found that the limitation of costs based thereon was improper.

There is no conflict with *United States* v. *Arizona Canning Company*, 212 F. 2d 532 (C.A. 10). The instant action of the Court of Appeals applies the same reasoning as that which underlies that opinion. There, the court vacated the District Court's judgment which limited costs on the erroneous theory that Rule 45(e)

(1) of the Federal Rules of Civil Procedure restricted the taxation of travel costs to travel within 100 miles from the place of trial. The court held that since the trial court erroneously thought itself bound by that rule in taxing costs, such limitation of the costs should be vacated. Here, the trial judge limited costs on the theory that claimants were entitled to judgment in their favor on the false and misleading charges. The Court of Appeals directed him to strike from the decree the limitation based upon this error.

As concerns costs, the Court of Appeals did not attempt to determine what specific costs should be taxed. That was left to the District Court, just as it was in *United States* v. *Arizona Canning Company, supra*, 212 F. 2d 532. However, the District Court was told that it abused its discretion in basing the denial of costs on the verdict which had been nullified.

This Court has held in *City Bank of Fort Worth* v. *Hunter*, 152 U.S. 512, that the award of costs on a theory inconsistent with the mandate of a reviewing court is properly corrected by mandamus. The Court of Appeals here has properly exercised its jurisdiction to correct such action.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

WILLIAM W. GOODRICH,
Assistant General Counsel,

PAUL M. STEFFY,
Attorney,

Department of Health, Education, and Welfare.

SEPTEMBER 1958.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1958 477609 3?1